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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, Appellant,
v.
THE UNITED STATES.
No. 176.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

PRELIMINARY STATEMENT.

The appeal of the Chicago, Milwaukee and St. Paul Railway Company of Idaho brings up for review a decree of the Circuit Court of Appeals for the Ninth Circuit, dated November 2, 1914 (R. 592), which affirmed a decree of the District Court for the district of Idaho, northern division, dated June 11, 1913, requiring the company to execute and file a stipulation defining its rights and obligations in the construction and operation of its railroad across the Coeur d'Alene Forest Reserve in Idaho, to be delivered to the United States upon approval of the company's maps of location by the Secretary of the Interior, and also awarding damages in the sum of $68,489.00 (R. 169–174).

Opinion, District Court (R. 136), 207 Fed. 164.

Opinion, Circuit Court of Appeals (R. 563), 218 Fed. 288.

In opposition to the numerous propositions advanced by counsel for the company in support of its various assignments of error we deem it sufficient to interpose the following counter propositions:

1. The company did not secure the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), prior to the reservation of the lands in question for forestry purposes.
2. After the reservation for forestry purposes no right of way across the reserved lands could be secured except upon compliance with the forestry laws and regulations.
3. The forestry laws and regulations required the company, as a condition precedent to the acquisition of its right of way, to execute and file the stipulation prescribed for the protection of the reserve.
4. The company evaded the execution of the required stipulation and constructed its road across the reservation in defiance of the forestry laws and regulations.
5. The court had jurisdiction in equity to grant the relief prayed for in the bill.
6. The decree, although imperfect in form, is not defective in substance.
7. The amount of damages awarded is correct.

The matters of law and fact necessary to the consideration of each of these propositions will be presented in the argument.

ARGUMENT.

I.

The company did not secure the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), prior to the reservation of the lands in question for forestry purposes.

Counsel for the company rely upon section 1 of the act of 1875, which reads as follows (18 Stat. 482):

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

On February 17, 1906, the company filed its articles of incorporation and proof of organization with the Secretary of the Interior (R. 188). Previously, on March 21, 1905, by direction of the Secretary of the

Interior, pursuant to a recommendation of the Secretary of Agriculture, the Commissioner of the General Land Office temporarily withdrew the lands in question "from all disposal, except under the mineral laws," pending the creation of a proposed forest reserve (R. 185, 247).

It is first contended that, because the right-of-way grant of 1875 was *in praesenti*, a location after the withdrawal took effect by relation as of the date of that act. Although the grant was expressed in the present tense, it could not operate presently without a present grantee, and the indication of a future grantee signified the intention that it should take effect in the future and not presently. *Hall* v. *Russell*, 101 U. S. 503, 509. It could not therefore take effect in this instance prior to the company's qualification as a grantee (*Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, 130), which was February 17, 1906, eleven months after the withdrawal.

Claiming then as of February 17, 1906, it is contended that the withdrawal of March 21, 1905, was ineffectual because it was made without authority of law. The act of March 3, 1891, §24 (26 Stat. 1095, 1103), authorized the President to "set apart and reserve" public lands for forest reservations. The power to establish permanent reservations includes the power to make temporary withdrawals. The Commissioner's order, by direction of the Secretary, must be regarded as the act of the President. And such executive disposition by authority of Congress

was a disposition by Congress. *United States* v. *Morrison*, 240 U. S. 192, 212; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 476; *Wolsey* v. *Chapman*, 101 U. S. 755, 770; *Wilcox* v. *Jackson*, 13 Pet. 498, 513.

But independently of the temporary withdrawal, the company was excluded by the permanent reservation established by proclamation of the President on November 6, 1906 (R. 196; 34 Stat. 3256).

Section 4 of the right-of-way act of 1875 reads as follows (18 Stat. 483):

> That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The company's map of definite location across the reservation was not filed until May 10, 1907 (R. 203), six months after the President's proclamation. Two

other maps showing different locations were filed, one October 23, 1906 (R. 192), and another March 20, 1907 (R. 198); but these appear to have been tentative only, were superseded by the map of May 10, 1907, and were therefore returned to the company (R. 209). They were received by the company without objection and were never refiled. Actual construction of the road across the reserved lands was not commenced until July, 1907 (R. 234), eight months after the reservation was established.

It is contended that this location subsequent to the reservation gave effect to the grant of 1875, by relation, as of February 17, 1906, the date of appellant's qualification as a grantee. Assuming for the moment that the doctrine of relation applies to the case of an intervening forest reservation (which it does not), it yet possesses no such scope as that asserted by counsel. The grant of 1875, although expressed in the present tense (§1), is of a right of way to be selected, in advance of actual construction of the road, by filing and approval of a map of definite location (§4). And so it has repeatedly been held that the grant does not take effect to cut off rival claimants until the filing of a map of definite location, or until the actual construction of the road in the absence of such a map. *United States* v. *Denver &c. Ry.*, 150 U. S. 1, 8; *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, 131; *Minneapolis, St. Paul &c. Ry.* v. *Doughty*, 208 U. S. 251, 255–257; *Stalker* v. *Oregon Short Line*, 225 U. S. 142, 149–150; *Barlow* v. *Northern Pac. Ry.*, 240 U. S. 484–486.

However, this doctrine of relation was contrived solely for the determination of the rights of rival claimants to public land, and to give effect to the principle that the first in time should be deemed to be the first in right. It never has been, and in its nature can not be, applied in favor of a claimant against the United States. Nothing short of full compliance with every condition prescribed by Congress for the acquisition of title to public lands will suffice to cut off the power of Congress to make other disposition of the lands. *The Yosemite Valley Case*, 15 Wall. 77, 86; *Shepley* v. *Cowan*, 91 U. S. 330, 338; *Campbell* v. *Wade*, 132 U. S. 34, 37; *Russian-American Co.* v. *United States*, 199 U. S. 570, 577–578; *United States* v. *Morrison*, 240 U. S. 192, 212. Hence approval by the Secretary of the Interior of a map of definite location, as required by section 4 of the act of 1875, is an essential prerequisite to the acquisition of a right of way under that act as against the United States. *Stalker* v. *Oregon Short Line*, 225 U. S. 142, 148–151. The company's map of definite location in the case at bar, filed long after the creation of the forest reservation, never was approved because of its failure to comply with the regulations made pursuant to law for the protection of the forest (R. 233–234).

II.

After the reservation for forestry purposes no right of way across the reserved lands could be secured except upon compliance with the forestry laws and regulations.

Section 5 of the general right-of-way act of 1875 provides (18 Stat. 483):

> That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale.

Lands reserved for forestry purposes certainly are "lands specially reserved from sale" and were therefore excepted from the operation of the right-of-way act by its plain language. The rule of *ejusdem generis* presents no difficulty. It may be admitted that the reservation referred to by the words "lands specially reserved from sale" must be of the same general class as a "military, park, or Indian reservation," in order to fall within the terms of the exception. Yet it is difficult to imagine a class of reservations embracing those created for military, park or Indian purposes which would exclude those created for forestry purposes. The enumerated reservations possess no common attribute which does not also belong to forest reservations. The one common characteristic of them all is that they embrace "lands specially reserved from sale," and this is also common to all reservations of public lands. Any rule which would exclude forest reservations would equally exclude every other kind of reservation except those

enumerated, and thus would restrict these general words so as to deprive them of all meaning. The rule of *ejusdem generis* can not be carried to such an excess. Like all other rules of interpretation it is designed to aid in ascertaining the meaning of the words used in case of doubt. It can not be employed to control the intention of the lawmaker where there is no doubt. In that case the rule would defeat its own purpose. 2 *Lewis' Sutherland Stat. Const.* (2 ed.), §437; *Caminetti* v. *United States*, decided by this court January 15, 1917.

The circumstance that forest reservations may not have been specifically in the legislative mind in 1875 proves only the wisdom of the general provision excepting from the future operation of the grant any lands that might be thereafter specially reserved from sale. For what purposes reservations might become necessary could not be foreseen; but it must have been considered that the purpose of any character of reservation might be defeated by an absolute right to construct a railroad across it and take timber from it free from all regulation. This is especially true of a forest reservation. The right conferred by section 1 of the act of 1875 to take timber from adjacent public lands for construction of a railroad and its appurtenant buildings is not limited to construction contiguous to the lands from which the timber is taken, but extends to any portion of the line. *United States* v. *Denver &c. Ry.*, 150 U. S. 1, 11. The area of adjacent lands from which timber may be taken is uncertain—perhaps not more than two, perhaps as

much as twenty, miles, according to the circumstances. *United States* v. *St. Anthony R. R.*, 192 U. S. 524, 539–540. Clearly the absolute right asserted by the appellant would be destructive of forest reservations, and of this the destruction wrought in the case at bar furnishes abundant illustration. The general exception in the act of 1875 of "lands specially reserved from sale" must have been inserted for some useful purpose. If it does not serve to exclude the right here asserted for the appellant company it is manifestly useless.

In all general right-of-way legislation since the adoption of the forest reservation policy in 1891 Congress has invariably classed forest reservations with military, park, and Indian reservations.

The act of March 3, 1891 (26 Stat. 1095), which first authorized the reservation of forest lands (§24, p. 1103), granted rights of way to canal and ditch companies "through the public lands and reservations," with restrictions for the protection of the government's occupation of "any such reservation." (§18, p. 1101).

The act of January 21, 1895, c. 37 (28 Stat. 635), authorized the Secretary of the Interior to permit rights of way for tramroads, canals and reservoirs "through the public lands of the United States, not within the limits of any park, *forest*, military or Indian reservation." The same language was used in the amendment of May 11, 1898, c. 292 (30 Stat. 404).

The act of May 14, 1898 (30 Stat. 409, 412), granted rights of way to railroad companies over the public lands in Alaska in substantially the terms of the general act of 1875, excepting "lands within the limits of any military, park, Indian, or other reservation."

The act of February 15, 1901, c. 372 (31 Stat. 790), authorized right-of-way permits for various uses "through the public lands, *forest* and other reservations" with certain restrictions relating to "any *forest*, military, Indian, or other reservation."

The act of March 4, 1911 (36 Stat. 1235, 1253–1254), authorized administrative grants of easements for rights of way for electrical power, telephone and telegraph lines over "the public lands, *national forests*, and reservations," subject to special restrictions relating to "any national park, *national forest*, military, Indian, or any other reservation."

Furthermore Congress has always regarded the act of 1875 as inapplicable to forest reservations. This is manifested by the practice of passing special acts in favor of designated railroad companies expressly making the general act applicable to particular forest reservations under suitable restrictions. (Acts of May 28, 1896, 29 Stat. 190; June 6, 1896, 29 Stat. 253; May 18, 1898, 30 Stat. 418; June 27, 1898, 30 Stat. 493; July 8, 1898, 30 Stat. 729; January 10, 1899, 30 Stat. 783; February 28, 1899, 30 Stat. 910; February 25, 1903, 32 Stat. 907). The significance of these acts can not be dismissed with the suggestion

that they merely conferred privileges already granted by the general act and therefore received but little consideration by Congress. An examination of them discloses that each one contains a clause forbidding the company to cut timber on the reservation outside the limits of the right of way. The right to take timber from lands adjacent to the right of way was a very valuable privilege granted by the act of 1875 and one for which the appellant's counsel most strenuously insist.

But regardless of whether forest reservations are excepted from the operation of the act of 1875 by the general language of section 5, they were excepted by subsequent laws enacted pursuant to section 6 of that act, which provides (18 Stat. 483):

> That congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

The laws providing for the creation and protection of forest reservations, and the departmental regulations made pursuant thereto, are inconsistent with the unrestricted right to construct railroads through them, and must therefore be regarded as superseding such right, if it ever existed under the act of 1875, by virtue of the power reserved in section 6 of that act.

And regardless even of this reserved power, the forestry laws were equivalent to a repeal *pro tanto* of the prior right-of-way act. *Campbell* v. *Wade*, 132 U. S. 34, 38.

III.

The forestry laws and regulations required the company, as a condition precedent to the acquisition of its right of way, to execute and file the stipulation prescribed for the protection of the reserve.

The act of March 3, 1891, §24 (26 Stat. 1095, 1103), authorized the reservation of forest lands by executive proclamation; and the act of June 4, 1897 (30 Stat. 11, 35), declared the purposes of such reservations to be "to improve and protect the forest," to "secure favorable conditions of water flows, and to furnish a continuous supply of timber." This latter act also authorized the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

In view of these forestry laws, the act of March 3, 1899 (30 Stat. 1214, 1233), provided:

> That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

Pursuant to the authority conferred by the act of June 4, 1897 (30 Stat. 11, 35), and on May 11, 1904, the Secretary of the Interior promulgated regulations for the occupancy and use of forest reservations and the preservation of the timber thereon (R. 177;

32 L. D. 481, 483). With special reference to the act of March 3, 1899 (30 Stat. 1214, 1233), authorizing the filing and approval of railroad right-of-way maps, the applicant was required, as a condition precedent, to execute and file a stipulation: not to interfere with proper governmental occupation of the reservation; not to cut timber outside the right of way; to remove no timber unnecessarily within the right of way; to remove all such timber, brush and refuse cuttings for such distance as the Land Office might determine to be essential to protect the forest from fires; to furnish men free of charge for fighting fires, and to give an approved bond running in the terms of the stipulation for payment to the United States of all damages to the public property by reason of such right of way "regardless of the cause or circumstances under which such damage may occur."

The act of February 1, 1905, c. 288 (33 Stat. 628), directed the Secretary of Agriculture to "execute or cause to be executed all laws affecting" forest reservations "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

With respect to railroads, this act committed to the Secretary of Agriculture the administration of national forest lands, except that relating to the location of rights of way over them, which was left within the jurisdiction of the Secretary of the Interior. On April 25, 1906, pursuant to an agreement between

the Secretary of the Interior and the Secretary of Agriculture defining their respective powers under this act (33 L. D. 609), the former promulgated an additional regulation as follows (R. 183; 34 L. D. 583):

> Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.

Under these laws and regulations, the requirement of a stipulation in definite form by the Secretary of Agriculture is a condition precedent to a lawful right of way over a forest reserve, and has the same force and effect as if it had been made by act of Congress. *United States* v. *Grimaud*, 220 U. S. 506, 515; *Light* v. *United States*, 220 U. S. 523, 534.

IV.

The company evaded the execution of the required stipulation and constructed its road across the reservation in defiance of the forestry laws and regulations.

On January 2, 1907, the chief law officer of the forest service of the Department of Agriculture, answering an inquiry from the attorneys of the appellant company, informed them that the Secretary of Agriculture "will be obliged to require a stipulation for the Coeur d'Alene similar to that now being negotiated for the Helena Forest Reserve" (R. 209, 210).

The Helena Forest Reserve stipulation was executed January 18, and approved by the Forester January 24, 1907 (R. 214–218). It was executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, which, like the appellant company, was a subsidiary of the Chicago, Milwaukee & St. Paul Railway Company. George R. Peck was general counsel of the parent company (R. 371) and represented the subsidiary companies in the capacity of agent and attorney in charge of negotiations with the administrative officers of the Government for rights of way sought by them through the Helena Forest Reserve in Montana and the Coeur d'Alene in Idaho (R. 368–369).

On May 10, 1907, the company filed its final map of definite location (R. 203) and, on the same day, in order to secure immediate permission to begin construction through the reserve in advance of the required stipulation, George R. Peck signed and filed in the Department of Agriculture an agreement that the company would "execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad," "to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest" (R. 210). Thereupon the advance permission asked for was given (R. 211), the Supervisor of the forest was notified by telegram (R. 212), and the company immediately began its construction work through the reserve (R. 22, 288).

On October 24, 1907, there was sent to the supervisor a form of stipulation for execution by the company (R. 219), more onerous in some respects than the Helena stipulation, but the officers of the company on November 15, 1907, refused to sign it, giving as their only reason that they desired to "await the outcome of certain negotiations which were pending at Washington, D. C., with the officers of the Interior Department and of the Department of Agriculture" (R. 225). These "negotiations" consisted of an attempt by Peck and his associate Field to persuade the officers of the Forest Service that the company should not be required to execute the stipulation provided for in the Peck agreement because it had just been discovered by Peck that the company's first preliminary map of location was filed before the President's proclamation establishing the reserve (R. 370–384). Failing in this (R. 432–435), Peck stated to the officers of the Forest Service on December 2, 1907, that he was authorized only to execute a stipulation like that made by the company for its right of way through the Yakima National Forest (less onerous than the Helena Forest stipulation, R. 227–229, 438–439, 458), and requested some assurance that the company would not be disturbed in its construction pending a proposed compromise of the matter (R. 225–226). This assurance was given and the Forest Supervisor was again notified by telegram (R. 226).

Further negotiations continued during several months, but without result (R. 235–247, 437–444).

On March 17, 1908, the company made plain its refusal to sign any stipulation, claiming its right of way under the act of 1875, unaffected by the forest reserve, and exempt from any obligation even to clear the right of way (R. 236). Consequently, on August 14, 1908, the Secretary of the Interior, on the request of the Secretary of Agriculture, notified the company that its map of location would not be approved until the stipulation required by the Department of Agriculture had been executed (R. 229–230); and again, on October 10, 1908, that unless the required stipulation were filed within fifteen days its application for a right of way would be rejected and its map would be stricken from the files of the Department (R. 231). Accordingly, on October 29, 1908, the required stipulation not having been filed, the company's application was rejected and its map was stricken from the files and returned to the company with notice of the action taken (R. 233–234). On June 25, 1909, this suit was instituted (R. 1). The railroad was completed July 31, 1909 (R. 234).

The astonishing assertion is made that these facts show permission by the Government officials for the construction of the company's road across the forest reserve without any stipulation. They show, on the contrary, that those officials required of the company a stipulation in definite form before the construction was begun; that this requirement never was withdrawn or gainsaid; that the company, by a sham agreement and a succession of shallow pretentions, gained

the forbearance of certain officials of the Forest Service to the extent of interposing no physical obstacle to its progress through the reserve; and that when the real purpose of the company's "negotiations" was revealed, its application for a right of way was rejected, its map of location was stricken from the files and this suit was brought to enforce compliance with the law and to obtain redress.

Furthermore, the only officer who had authority to grant permission to construct a railroad through the reserve was the Secretary of the Interior, and by him such permission was expressly refused. This refusal was the result of the company's defiance of the regulations made pursuant to law and for the law's enforcement. No consent or acquiescence of any other official could bind the Government or afford the company any refuge. *Pine River Logging Co. v. United States*, 186 U. S. 279, 291.

V.

The court had jurisdiction in equity to grant the relief prayed for in the bill.

After setting out the facts which have been mentioned, the bill prayed that the company be compelled to execute and file the stipulation required by the Secretary of Agriculture, that it be enjoined from occupying the reserve until it shall have executed and filed the required stipulation and until its map of location shall have been approved by the Secretary of the Interior, and that the plaintiff be awarded damages and general relief (R. 35–36).

Failure of the company to execute the required stipulation, without which its map of location could not be approved, places it in the position of an ordinary trespasser on the property of the United States, and unless it shall comply with the law and lawful regulations in this respect its continued occupation of the national property will be a continuing trespass and a permanent menace. Jurisdiction in equity at the suit of the United States to enforce compliance with the law and award incidental compensation for injuries already suffered through noncompliance in such a case is too plain for discussion. *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 564–567; *In re Debs*, 158 U. S. 564, 582–589; *Camp* v. *Boyd*, 229 U. S. 530, 552.

The prayer for damages in general terms and for general relief was sufficient to enable the court to award damages for the injuries alleged in the bill and shown by the evidence. *McGowan* v. *Parish*, 237 U. S. 285, 297.

The Peck agreement to execute the required stipulation, which the company repudiated, and about which so much is said in the brief of opposing counsel, is of small consequence, except as explaining the accommodating forbearance of the Forest Service officials. The issue in this case is not whether the company executed an enforceable agreement to comply with the law, but whether it did in fact comply with the law. Hence the questions raised, accompanied by an affluence of citation, as to Peck's authority, his alleged mistake,

the consideration for his agreement, its mutuality, certainty and ratification, are without any real significance.

The law, operating through authorized administrative action, required for the protection of the forest reserve the execution of a stipulation by the company in definite form. The circumstance that Peck, with apparent authority, agreed that the company would execute the very stipulation so required, thereby enabling the company to occupy the forest reserve without any stipulation, tended to confuse the courts below and induced them to regard the bill of the United States as one for specific performance of Peck's agreement. But the bill is properly founded upon the requirements of the law, involving the property rights and governmental functions of the United States, and should be so regarded.

VI.

The decree, although imperfect in form, is not defective in substance.

The stipulation required by the decree to be executed (R. 169) is identical with that which the bill (R. 19, 21, 38) and the evidence (R. 209, 210, 214) show to have been required by the Secretary of Agriculture, under lawful regulations as a prerequisite to the acquisition of this right of way (*supra*, pp. 13, 15).

Perfection of form would suggest that the decree should have restrained the company from further occupation of the reserve unless within a specified

time it should execute and file the required stipulation. Instead of this the decree directly commands the execution and filing of the stipulation within thirty days, but without awarding the alternative injunction. The only difference in result is that, if the company should disobey the decree, further compulsory proceedings would be necessary to make it effectual. In order to avoid such necessity we suggest the propriety of a direction from this court that the decree be amended by adding a clause to the effect that upon failure to execute and file the required stipulation the injunction will issue as prayed for. *New York City* v. *Pine*, 185 U. S. 93, 104, 108.

VII.

The amount of damages awarded is correct.

The court awarded damages in the sum of $68,489, composed of the following items: For timber cut on and adjacent to the right of way, $26,989; for timber destroyed by fire, merchantable timber, $12,000, seedlings, $24,000; and for obstruction of streams, $5,500 (R. 168).

Damages were awarded in accordance with the provisions of the stipulation which the company was required to execute and should have executed before it entered upon the forest reserve (R. 168). No other measure of damages could have been adopted without treating the company as a trespasser and peremptorily enjoining the operation of the railroad. Rightful operation of the railroad depended upon lawful

acquisition of the right of way, and this presupposed the subjection of the company to the terms of the stipulation.

After reciting the laws and regulations requiring it, the stipulation bound the company (R. 170): to clear and keep clear of all inflammable substance the right of way and a strip 250 feet wide on either side, except such as the Forester might specifically designate in writing; to dispose of all brush and other refuse as required by the forest officer in charge; to cut all trees when physically possible so that they will fall entirely within the strip to be cleared, and so far as practicable to pile no timber or wood less than 100 feet from the edge of the forest reserve (clause 1); to pay to the United States, at $1.00 per cord for wood and $3.00 per thousand feet board measure for usable or merchantable timber, for all wood and timber cut on the right of way and the cleared strips which the company might desire to use or sell, otherwise to leave it compactly piled with all limbs removed for disposal by the Forest Service; to transport such timber and wood, if sold by the Forester, at established freight rates (clause 2); to put in a side track sufficient to handle timber and wood sold from the forest (clause 3); to construct and maintain free of charge crossings for existing roads and trails intersected by the railroad (clause 4); to observe such reasonable precautions against fire as the forester may prescribe; at all times to exercise the utmost care to prevent fires, and "promptly and without

charge give all reasonably possible assistance in men and material, under the direction of the forest officer in charge, to fight fire within said National Forest adjacent to said right of way" (clause 5); to pay to the United States "for any and all damage caused by fires, or otherwise sustained by the United States by reason of the use and occupation of said National Forest by the company, its successors and assigns" (clause 6); and to "make any assignment or transfer of this right of way through the said National Forest expressly subject to the fulfillment of all the conditions herein contained, by the assignee or transferee" (clause 7).

In view of the concurrent findings of both the lower courts, extended consideration of the evidence is unnecessary. It is incumbent upon our adversaries to show that any finding to which they object is clearly erroneous. *Gilson* v. *United States*, 234 U. S. 380, 383, and cases cited.

For timber cut on and adjacent to the right of way.

It is objected that the terms of the stipulation which govern this item are in conflict with the act of June 4, 1897 (30 Stat., 11, 35), as amended by the act of June 6, 1900 (31 Stat. 661), because provision is there made for sales of timber from forest reservations at not less than its appraised value after advertisement, except in cases of unusual emergency. The contention is that this provision excludes authority to charge for timber cut by the company on or in connection with its right of way. The purpose of

this provision is stated in the statute to be for "preserving the living and growing timber and promoting the younger growth." It therefore obviously relates only to those portions of forest reservations which are devoted exclusively to forestry purposes; it could not apply to any portion occupied and used for right-of-way purposes. As to such occupancy and use, another part of the act of 1897 (30 Stat. 35) provides that they shall be governed by the forestry rules and regulations. The power to regulate includes the power to prescribe the terms of such occupancy and use. As the railroad construction necessitated the cutting of timber on the right of way and adjacent strips, there was implied authority to charge the company for such as it might appropriate. The general power to do this by regulation under the act of 1897 is apparently recognized in the act of February 1, 1905 (33 Stat. 628), which provides for the disposition of "all money received from the sale of any products or *the use of any land or resources* of said forest reserves." *United States* v. *Grimaud*, 220 U. S. 506, 521–522.

Concerning the quantity of timber cut, the witness Skeels, an expert timber cruiser in the Forestry Service, testified that he scaled every tree that was cut by the company on the right of way and adjacent strips, and from this data he made accurate estimates and entered the result on maps showing each subdivision of forty acres affected (R. 250–257). These entries were made in nearly every case at the close of

each day's work. Sometimes it might have been two or three days before the data were "worked up" (R. 255). He also testified that Baker, the company's cruiser assigned to accompany him, did so on a part of the cruising, and as to the other part accepted as correct the figures made by the witness (R. 252–253). The estimates were "finally agreed upon" (R. 254). From the maps upon which these estimates were entered the witness compiled a report to his superior (R. 255, 257). The maps were put in evidence as exhibits 2 to 33 inclusive, and the report was introduced as exhibit 34 (R. 257). The report is printed in the record (R. 460–487). Of the maps only exhibit 2 has been printed in an addition to the record (Add. R. 5), but there is a stipulation of counsel that this exhibit is similar in form and character to exhibits 3 to 33, and "that the notations and data on said exhibits Nos. 2 to 33 are correctly reproduced and summarized in tabular form in the tables forming part of plaintiff's exhibit No. 34, already printed" (Add. R. 1). All of this timber was appropriated by the company and either used in its construction work, wasted, or sold (R. 268–269, 286, 390).

The quantity of timber thus shown to have been cut and appropriated was 8,993,580 feet board measure (R. 487). At $3 per thousand feet, the price fixed in the stipulation (R. 172), its value was $26,980.74. The amount awarded on account of this item was $26,989.00 (R. 168).

For timber destroyed by fire.

The bill charged the destruction upon specifically described lands of the United States by fires set and caused by the company "through lack of proper precaution against fire," 4,045,700 feet board measure of merchantable timber, and 1,344½ acres of seedlings (R. 29–32). These amounts were shown to be correct by competent and undisputed testimony. The burned areas were cruised jointly by Seery and Baker, representing respectively the Government and the company, and from the notes made and estimates agreed upon by them four maps were prepared and signed showing the quantities of each class of timber burned on each legal subdivision of forty acres (R. 327–333, 337–338). These maps were introduced as plaintiff's exhibits 36, 37, 38 and 39 (R. 333). From the same data an official report was prepared by Seery which was compared and checked over by Baker and a copy of which was delivered to Day (R. 330), the company's local representative (R. 252, 275). This report was introduced as plaintiff's exhibit 35 (R. 330) and appears in the printed record at the end of the testimony (R. 488–495). Only one of the maps (ex. 37) is printed (Add. R. 6), but it is accompanied by a stipulation that it is similar in character to the other three, and "that the notations and data appearing on the face of these exhibits are correctly reproduced and summarized in tabular form in complainant's exhibit No. 35, already printed" (Add. R. 1).

It was shown that these fires originated on the company's right of way, and were due to lack of precaution against fire and to carelessness in making camp fires and burning brush by the men engaged in the railroad construction work (R. 266, 274, 286, 290, 320–323, 325). It was also shown that the company was warned against these acts of negligence (R. 237, 240, 245).

The quantity of merchantable timber so burned was shown to be 4,045,700 feet board measure (R. 489). At $3 per thousand, the stipulated price for merchantable timber both in this and the Helena Forest stipulation (R. 172, 216), the resulting damage was $12,137.10. The amount awarded by the court on this account was $12,000 (R. 168).

It is insisted that inasmuch as the stipulated price of $3 per thousand was only for timber appropriated by the company, the court should have determined the reasonable market value upon the evidence, and that the case should be remanded for that purpose. It may well be assumed, as both the lower courts assumed, that the reasonable market value was the value agreed upon for timber cut and used. If not, the omission to find such value from the other evidence was favorable to the company, as nearly all of the witnesses who testified on that subject placed the market value at not less than $4 per thousand feet. (R. 258–259, 267–268, 270, 291, 302, 331, 363–364, 416, 419–420, 452–453.) The price specified in practically all of the Government sales

contracts in this locality "for white pine and mixed species was $4 flat rate, or $3 for mixed species and $5 for white pine" (R. 452). Actual sales were being made by the Gov ent at $4 to $5 per thousand for green timb he "St. Joe drainage" where the fires in question occurred (R. 453). The burned area was covered with a growth of the finest white pine, and the estimate of $4 per thousand was considered as very liberal to the company (R. 280, 364). Lower estimates were based very largely upon purchases from settlers, which was not a fair criterion (R. 282–283, 454).

The younger growth of timber on a forest reservation which is too small to be merchantable has no market value; but, like a farmer's growing crop, it possesses actual value. This value is one special to the United States and arises from a settled national policy clearly declared by Congress. Forest reservations are established, among other objects, "to furnish a continuous supply of timber for the use and necessities of citizens of the United States," and, in order to "insure" this object, rules and regulations are prescribed for "the purpose of preserving the living and growing timber and promoting the younger growth" on such reservations (act June 4, 1897, 30 Stat. 11, 35). To accomplish the general objects of forest reservations many millions of dollars are annually appropriated, and specifically for "seeding and tree planting" every annual forest service act

since 1911 has appropriated $165,640 (39 Stat. 461; 38 Stat. 429, 1100; 37 Stat. 287, 842; 36 Stat. 1252).

The general rule that the measure of damages for destruction of immature timber is the difference in market value of the land before and after the destruction, is not susceptible of application to national forest lands, since such lands have no ascertainable market value. In the absence of market value damages for such destruction are necessarily uncertain and difficult of ascertainment; but, as in the case of the farmer's growing crop, this should not prevent a recovery, provided the amount is made as certain as the nature of the case permits. 3 *Sedgwick on Damages* (9th ed.), §937.

The expert foresters who testified for the Government calculated the amount due on this account according to two separate methods: (1) the estimated market value of the immature trees at maturity, minus the cost of caring for such trees from the time of destruction to the age of maturity; and (2) the cost of restocking the burned area with young trees, plus the cost of caring for them up to the average age of the trees when destroyed. These calculations were based upon exact facts and reduced to tables which were introduced as exhibits 1A, 2A, 3A, and 4A (R. 341–368; Add. R. 1, 7–13). This testimony was not contradicted, and no better method for computing this item of damage has been suggested. In view of the concurrent findings of both lower courts we refrain from discussing the testi-

mony at length. We only observe that the total amount as shown by these schedules, according to either method, is more than the amount found by the court.

For obstruction of streams.

The court awarded "$5,500 on account of rock and other debris wrongfully thrown into the St. Joe River and its tributaries" (R. 168). This item accords with a specific allegation of the bill as to the St. Joe River (R. 29), and the testimony shows that the river and its tributaries were treated as one stream, the tributaries being denominated as "forks" of the St. Joe; that they were within the forest reserve, useful in their ordinary condition for three months in the year, and at all times with the aid of splash dams, for driving logs; that they afforded a cheap and easy means of transportation for over two hundred million feet of national forest timber; that the rock and debris thrown into them by the company destroyed their value for logging, whereby the transportation of this timber was rendered much more difficult and expensive (R. 262–265, 272–273, 294, 302, 308). The witness Hamilton made a careful estimate of the cost of removing each of these obstructions, and placed the total cost at $4,100 "to make it a drivable stream during high water only; that would not be the cost of removing all the obstructions" (R. 299). The witness Gregory made a similar estimate of "the only points that I took note of" and placed the total cost at $3,500 for "the

removal of just a sufficient number of rocks to place the stream in a navigable condition." He "did not estimate taking out all the rock" (R. 314). The witness Seery roughly estimated the total "cost to take out the rocks that the railroad company put in there" to be "in the neighborhood of $10,000" (R. 336). Upon this testimony it can hardly be said that the finding of $5,500 was clearly erroneous.

We do not contend that these streams are navigable waters of the United States, nor that their obstruction is a public nuisance. We maintain that as a part of the forest reserve they are the property of the United States, for the obstruction of which to the damage of the United States the law makes the company liable.

The stipulation, without which the company is a trespasser, having been required pursuant to law, has all the force of the law itself. Clause 6 secures payment "for any and all damage . . . sustained by the United States by reason of the use and occupation of the said National Forest by the Company" (R. 173). That this was intended to include damages arising from the obstruction of national forest streams, and as such was fully authorized, results from a consideration of the language of the act of June 4, 1897 (30 Stat. 11, 35), which declares that one of the purposes of forest reservations is to "secure favorable conditions of water flows," and authorizes such rules and regulations "as will insure the objects of such reservations."

CONCLUSION.

The decision of the courts below should be affirmed, with a direction to amend the decree by adding a clause to the effect that unless the required stipulation be executed and filed within thirty days the injunction will issue as prayed for in the bill.

Respectfully submitted.

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FEBRUARY, 1917.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 176

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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APPELLANT'S REPLY BRIEF.

POINT I.

APPELLANT'S TITLE TO THE RIGHT OF WAY WAS IN NO WISE DEPENDENT UPON THE FILING OF A MAP OF ITS LOCATION, AND THE DATES OF SUCH FILINGS, AND THE APPROVAL OR NONAPPROVAL THEREOF, ARE NOT MATERIAL.

When appellant, by filing its articles of incorporation and proofs of organization with the Secretary of the Interior, accepted the benefits of the Act of March 3, 1875, and identified itself as a grantee under that act on Feb-

ruary 17, 1906, the grant to it became effective as a present grant. It then occupied the same relation to the United States, its title to the right of way was the same, as if on that day Congress had passed a special act making to it, by name, a grant in the same terms as were used in the Act of 1875.

O. S. L. R. Co. v. *Stalker,* 14 Ida., 362; 94 Pac. Rep., 56, 62; affd. 225 U. S., 142.

Dakota Central R. R. Co. v. *Downey,* 8 L. D., 115, 117.

Jamestown & N. R. Co. v. *Jones,* 177 U. S., 125, 130.

The grant would be a vested grant on that date. The specific land granted would not be identified; the grant would remain a float until identification; but when identified in the manner prescribed, the vested title would at once attach as of the date of the grant to the specific grantee, viz: the date of filing the articles and proofs of organization. This being true, the filing of the map is material only in so far as it affects the question of identification, and consequent attachment of the floating grant to a specific strip of land; it cannot affect the vesting of the floating title, for that has already vested.

The identification of the specific strip of land can be made by actual construction, without the necessity of filing any map or invoking the approval in any way (at least subsequent to the acceptance of the articles and proofs of organization) of the departmental officers.

Jamestown & N. R. R. Co. v. *Jones,* 177 U. S., 125, 130, 132.

Barlow v. *N. P. Ry. Co.,* 240 U. S., 484, 487-8.

There is, indeed, doubt whether it can be identified in any other way. The privilege of filing a map in advance of construction *on surveyed lands,* is indeed given

by Section 4 of the Act; and it is provided that upon the approval of such map, all lands over which the right of way shown by the map shall pass, shall be disposed of subject to such right of way. But is this more than a tentative location? If the road, when actually constructed, departs from such map location, the right of way grant as between the United States and the grantee is automatically relocated so as to conform to the constructed road.

Washington & I. R. Co. v. *Coeur d'Alene R. Co.*, 160 U. S., 77, 97.

N. P. Ry. Co. v. *Smith*, 171 U. S., 260, 268.

And although in this case there has been no approval of appellant's maps yet, as there has been actual construction and consequent identification of the strip granted, the failure or refusal of the Secretary to act upon the maps tendered may be disregarded as a material factor in determining whether appellant secured title to its right of way. If there is no other obstacle than the lack of the Secretary's approval of the maps, the title is a vested one.

Point II.

THE TITLE GRANTED ATTACHED TO THE SPECIFIC STRIP OF LAND UPON THE IDENTIFICATION THEREOF, AS OF THE DATE OF THE VESTING OF THE GRANT IN THE GRANTEE, AS AGAINST THE ENTIRE WORLD.

Counsel contend that the title does not vest, as against the United States, so as to cut off the power of Congress to make other disposition of the lands until full compliance with every prescribed condition; that the doctrine of relation, by which counsel assert effect is given to the grant as of a date earlier than the iden-

tification of the granted land, has no application against the government.

This position is founded upon a misapprehension of the nature of a floating present grant. A floating present grant does not attach as of the date of the grant upon the identification of the granted strip or parcel, by virtue of the equitable doctrine of relation. It so attaches because the legislative body, in the exercise of its will, has conveyed to, and vested in, the grantee a present title to the thing granted. The specific land granted is, in float grants, not located or described, but provision is made for its location and identification by acts to be thereafter performed, usually by the grantee. But when these acts are performed, the identified land is then ascertained to have been granted and the title vested in the grantee since the date of the grant. At common law, identification of the thing granted was essential to the vesting of title, but Congress being a legislative body, its grants are laws, as well as conveyances, and as such must be given effect pursuant to the congressional intention, however inconsistent with common law restrictions.

Schulenberg v. *Harriman,* 21 Wall., 44, 62.

And the title to the identified land vests, under these grants, as of the date of its grant, not only against rival claimants but as against the whole world, because of the expression of the legislative will to that effect in the granting act.

There is in all this no question of the equitable doctrine of relation; and cases arising under the settlement laws where grants *in praesenti* are not involved, have no bearing. The cases cited by appellee on page 7 are all of this character. Perhaps no better illustration of the essential difference between such cases and one involving a present grant, as here, could be selected, than

that afforded by *United States* v. *Morrison,* 240 U. S., 192. The land in that case was a part of section 16. Prior to the filing of the approved township plat in the land office, by which act the official survey would have been completed and the sections identified, the land was withdrawn for forest reserve purposes. The claimant, who asserted title under the State of Oregon, contended that there had been an antecedent grant *in praesenti* to the state of all sections numbered 16 or 36, which attached to the specific lands as of the date of the granting act, as fast as they were identified by the survey; and which, therefore, antedated the forest withdrawal. This court ruled against this claim, *but upon the ground that the state grant was not one in praesenti.* And the care taken to show that the grant was not one *in praesenti,* but was one *in futuro,* is eloquent of the opinion of the court that if the state grant had been one *in praesenti,* the title would, upon the identification of the section by survey, have attached as against the United States, as of the date of the granting act, and would have antedated the forest withdrawal. And this case is an almost conclusive ruling against the contention of appellee upon this point.

It is, of course, true that Congress may, in its legislative present grants of lands to be identified in the future, reserve the right to dispose of lands, regardless of the grant, until such time as the granted title attaches by the identification of the thing granted. The land grants made to aid in the construction of railways are examples of such legislation. In such cases, the object in view is usually accomplished by limiting the description of the lands granted to those which are, at the date of filing the identifying map of definite location, not reserved, sold, granted, or otherwise appropriated, and which are free from pre-emption, or other claims

or rights. But such reserved rights exist, not because the grant is not effective as against the government from its date, but solely because of the express reservation in the granting act of such power of disposition. Where it is not so reserved, it does not exist. This is carefully pointed out by this court in *Railroad Company* v. *Baldwin,* 103 U. S., 426, 428. Whether Congress, in the Act of March 3, 1875, did reserve rights, as against one who had become a grantee by filing its articles of incorporation and proofs of organization, to dispose of lands subsequent to the date of the grant to that grantee, so as to exclude them from the operation of the act, must be determined entirely from the terms of the act itself. So far as it reserved such right, it exists; but when there is no reserved right of disposition found in that act, it does *not* exist. We pointed out in our opening brief (p. 71) that the provision of Section 3, for the condemnation of private lands and possessory rights, by implication, reserved the right to permit the attachment of settlers' claims until the identification, either tentative, by filing a map, or absolute by construction, of the strip granted; and gave to those claims superiority over the right of way grant. In conflicts between the rights claimed by such settlers and those claimed by the railway, the question of the date of the vesting of the float title in the railway company is, therefore, not material. In such cases, the question is, *because of the statutory reservation,* solely one as to whether the settler's rights had attached prior to the identification of the specific right of way. The cases cited by counsel (page 6) are all of this nature, but they throw little or no light upon whether there is a right reserved in the act to defeat the vested title of a grantee, by executive reservation of the lands. This question must be answered by the provisions of Section 5 of the Act. Certain classes of

reservations were excluded from the operation of the act; and the power to defeat the grant to the extent of the lands reserved for such purposes, was undoubtedly retained. But this was not a general power, and would not include reservations not of the classes specified in Section 5. As against such nonexcluded reserves, the granted title would remain operative and take priority. That forest reservations are of a nonexcluded class was, we think, abundantly shown in our opening brief.

Point III.

THE GOVERNMENT'S CONSTRUCTION OF SECTION 5 OF THE ACT OF MARCH 3, 1875, AS INCLUSIVE OF FOREST RESERVES, IGNORES THE LANGUAGE OF THE SECTION.

Confronted with the necessity of arguing that forest reserves are included within the classification of "military, park or Indian reservations, or other lands especially reserved from sale," counsel say:

> "It is difficult to imagine a class of reservations embracing those created for military, park or Indian, which would exclude those created for forestry purposes. The enumerated reservations possess no common attribute which does not also belong to forest reservations. The one common characteristic of them all is that they embrace 'lands specially reserved from sale,' *and this is common to all reservations of public lands.*" (Brief, p. 8.)

And again:

> "For what purposes reservations might become necessary could not be foreseen; *but it must have been considered that the purpose of any character of reservation might be defeated by an absolute right to construct a railroad across it and take timber from it free from all regulation.*" (Brief, p. 9.)

The italics in these quotations are ours. This contention involves a construction of Section 5 as excluding

"all reservations of public lands." But such a construction of the statute ignores the phraseology employed by Congress, which clearly shows, as pointed out in our opening brief on pages 73 to 78, inclusive, that Congress did not intend to exclude all reservations. We agree with counsel that it will be impossible to include forest reserves within the provisions of this section, without including all public land reservations, but find in that fact support for our contention that forest reserves are not so included, rather than a justification for a contention which assumes that Congress intended to express a purpose which the language employed tended to contradict.

Point IV.

THE RULES AND REGULATIONS PROMULGATED BY THE EXECUTIVE OFFICERS.

The Government contends, in Point III of its brief, that under the federal laws and executive regulations promulgated in supposed compliance with, and conformity to, such laws, the requirement of a stipulation from the Railway Company is a condition precedent to the acquisition of a lawful right of way over a forest reserve. That executive regulations require the execution of such a stipulation is not denied; but it by no means follows that such a stipulation is a condition precedent to the acquisition of a lawful right of way, or of any right. Unless required, or authorized by statute, so to do, the executive officers are without authority to impose conditions upon the acceptance or enjoyment by the grantees of the grants conferred by Congress. Even when the making of rules and regulations is expressly authorized, such rules and regulations must be consistent with the legislative enactment; and they cannot be made an instrumentality to modify or defeat the legislative will ex-

pressed in the statute, by either enlarging, decreasing or defeating a grant of rights or privileges.

United States v. *United Verde Copper Company*, 196 U. S., 207, is directly in point. The Act of June 3, 1878, authorized the taking of timber for mining, or other domestic purposes, from the public mineral lands, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth upon such lands, and for other purposes." The Secretary made a rule that no timber should be used for smelting purposes, smelting being a separate and distinct industry from that of mining. The regulation was held invalid. The court said:

> "If Rule 7 is valid, the Secretary has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. The ambiguity arises from the words '*and for other purposes.*' They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant a power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress."

See also:

United States v. *George*, 228 U. S., 14, 21.
American School, etc., v. *McAnnulty*, 187 U. S., 94, 109.

In determining the effect which should be given to the departmental rules and regulations, it is necessary to consider the legislative enactments. We have seen in our opening brief that the Act of March 3, 1875, made a

present grant of a right of way to railway companies accepting its provisions, over the public lands, including lands within the limits of reservations of the character of forest reserves. By Section 4 of this act the grantees were permitted, if they desired, to make a location of the right of way strip in advance of construction, *so far as such location extended over surveyed lands,* by filing with the land department a plat of the located line and securing the approval thereof by the Secretary of the Interior. This privilege did not, under the terms of the act, extend to unsurveyed lands. (Opening brief, p. 98.) The grantee, however, was not obliged to exercise the privilege. It could *by actual construction* locate the granted strip over both surveyed and unsurveyed public land, and thereby cause the granted title, previously a float, to attach to the right of way so identified. When proceeding in this method, no action by the executive officers in the nature of an approval of the location was required. The grantee was not even required by the statute to furnish the department with a map of its constructed road, or with any information with respect thereto.

By the Act of March 3, 1899, this Act of March 3, 1875, was supplemented and amended by the provision "that in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a * * * railroad, * * * over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby." This act contained no words of repeal, and did not purport to deprive any grantee or prospective grantee of any of the rights or privileges conferred by the Act of 1875. Upon the contrary, it purported to enlarge the authority of the Secretary to accept and approve maps filed to locate a right of way

in advance of construction (the only approval which the Act of 1875 contemplated) by permitting him to file and approve such maps of right of way across forest reserves and reservoir sites, whether surveyed or unsurveyed, when in his judgment the public interests will not be injuriously affected thereby.

In neither of these acts is there provision authorizing the promulgation of rules or regulations, nothing suggestive of any congressional purpose to permit the Secretary to limit or modify the grant which Congress itself made. It is true that after the passage of the Act of 1875, the Secretary did issue a circular of instructions, which circular was from time to time reissued and modified. This circular set forth the department's interpretation of the act, prescribed the character of the papers which should be filed to show the corporate character of the applicant, its organization, the form of maps, etc., but was purely advisory in its character, and did not undertake to in anywise impose conditions upon the grant.

The provision of the Act of 1899 authorizing the Secretary to file and approve maps of right of way across forest reserves "when in his judgment the public interests will not be injuriously affected thereby," undoubtedly conferred a discretion upon him. It made it his duty to consider and determine, before accepting and approving such map, whether the public interests would "thereby" be injuriously affected. The effect of such action would be to, *prima facie* at least, vest in the railway company a title to the strip of land so identified—a title which it could retain until forfeited by act of Congress or judicial proceedings pursuant to such act, that is to say, indefinitely, without constructing its railway. It could impede, if not prevent, the construction of other railways desirous of using the same route. A right of way so held would prevent the disposal of the timber

thereon by the government; it might well interfere with the acquisition of necessary easements for canals or ditches under the Act of March 3, 1891 (6 Fed. Stat. Ann., 508); or for generating or distributing electric power under the Act of May 14, 1896 (6 Fed. Stat. Ann., 510-11); or with the easements provided for in the Acts of June 4, 1897 (7 Fed. Stat. Ann., 314), or of May 11, 1898 (6 Fed. Stat. Ann., 512). If upon a consideration of the entire subject, the Secretary deemed that for any of the foregoing or other reasons, the public interest would be injuriously affected by his acceptance and approval of the map tendered, it would be his duty to refuse it. Having such power of refusal, it is probable that the Secretary could make an acceptance and approval conditional upon the removal of, or agreement to remove, any obstacle within the power of the company to remove, which, unremoved, would render the proposed acceptance and filing, with the consequent grant, injurious to the public interest. But if the Company had, as we have shown it had, the legal right to proceed with its construction without filing any map, or securing the approval thereof, the Secretary could not, by refusing to accept or approve the map, unless the grantee agreed to some condition, prevent or limit the acquisition by the grantee of the full benefits of the Act of 1875.

Even if we assume the government's contention, that by virtue of the provisions of Section 5 thereof, the Act of 1875 has no application to lands in forest reserves; that the Act of 1899, although it contains no words of grant, does grant a right of way, upon condition that a map thereof be filed and its approval be secured from the Secretary, and further construe the provision "when in his judgment the public interests will not be injuriously affected thereby," to refer to the effect of the construction and operation of the road, although it in terms

referred to the effect of the filing and approval of the map, and further assume that the Secretary is thereby empowered to make his acceptance and approval of the map conditioned upon the agreement of the grantee to comply with conditions which, in the opinion of the Secretary, would obviate the injurious results that would otherwise follow the construction and operation, still the power to impose conditions, even under these circumstances, would of necessity be limited to those reasonably adapted to the protection of the public lands; and conditions going beyond this would be unauthorized. Under the broadest possible construction, then, there is nothing in the right of way acts which could support any regulations beyond what would be reasonably necessary to protect the public forest.

The contention, however, is that the authority to make rules and regulations is found in the Forest Reserve Act of June 4, 1897. This act declares the purpose of the reservations to be "to improve and protect the forests, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens."

It authorizes the Secretary to make provisions for the protection of the forest against destruction by fire and depredations, and provides that "he may make such rules and regulations, and establish such service, as will insure the objects of such reservations, namely, *to regulate their occupancy and use and to preserve the forests thereon from destruction.*" The power conferred is thus limited by the express designation of the purposes to be accomplished thereby. It is not a general power, and cannot be exercised to destroy rights conferred by other congressional enactments. Under it, the Secretary cannot legislate, or make any rule or regulation inconsist-

ent with laws enacted by Congress. (*United States* v. *United Verde Co.*, 196 U. S., 207, 214-5.)

The question then is: Do the rules and regulations relied upon destroy rights conferred upon the grantee by the right of way acts, or are they consistent with those acts or the forest reserve legislation?

The rules and regulations referred to by the Government were promulgated February 11, 1904. (This date is erroneously given in the brief as May 11, 1904. (Rec., 8, 176.)) They were amended April 25, 1906 (Rec., 10, 183), so that the provisions stated in the Government's brief, on page 14, were canceled, and in lieu thereof it was provided:

> "Whenever a right of way is located upon a forest or timber land reserve, the applicant must enter into such stipulation, and execute such bond, as the Secretary of Agriculture may require for the protection of such reserve."

Passing without comment the delegation by the Secretary of the Interior to the Secretary of Agriculture of the discretion and authority which Congress had vested in the head of the Interior Department, we note that this regulation assumes that the acquisition of a right of way in forest reserves is dependent upon the consent of executive officers, rather than upon the statutes of Congress; and further assumes the existence of a power in such officers to impose conditions upon the exercise of the rights which the right of way acts had conferred. Clearly, if the acts of Congress had vested title in the grantee, with the right of locating the right of way by construction without filing a map, these assumptions of power were in violation of those acts; and unwarrantably deprived the grantee of rights which Congress had ordained that it should have.

Assuming, however, for the purposes of the argument, that the right of way through the forest reserve could be secured only by the acceptance and approval of a map of location, the stipulation required would be, from the nature of the power to regulate conferred upon the Secretary, confined to those matters which were essential to the protection of the forest. They could not extend to matters which would limit or defeat the grant. The power to regulate could not be extended to a denial of the rights themselves, or to a substitution for the privileges granted by the statute, of different privileges prescribed and designated by the executive officers. An examination of the stipulation demanded, and of that required by the decree, shows, however, that this is precisely what is attempted in this case. The grant was of a right of way to be compensated for only by the construction and operation of the railway. "It was not a mere bounty for the benefit of the railroads but was legislation intended to promote the interests of the Government, and in enhancing the value of those public lands through or near which such railroads might be constructed." (*U. S.* v. *D. & R. G. Ry. Co.*, 150 U. S., 1, 8, 14; *U. S.* v. *M. & S. W. R. Co.*, 176 Fed., 762, 768, 769.)

The stipulation embraced, as one of its principal items, an obligation to pay for timber on the right of way granted and for that cut off the right of way pursuant to the requirements of the forester. Three things are noticeable in this provision: (1) It undertakes, in violation of the legislative will expressed in the right of way acts, to limit the grant by excluding the timber standing on the soil granted; (2) it contemplates a sale of the timber to the Railway Company in violation of the Forest Reserve Act of 1897, prohibiting such sales; and (3) it is not a measure in any way designed for the protection of

the forest. It was, therefore, beyond the power of the executive officers to demand.

The only decisions cited by counsel to sustain the authority of the Secretary are the forest reserve cases (*United States* v. *Grimaud,* 220 U. S., 506; *Light* v. *United States,* 220 U. S., 523). These cases involved grazing privileges within forest reserves, and arose under the Act of June 4, 1897, and supplemental legislation relating to the occupancy of forest reserves and the establishment of rules and regulations relating thereto. The court held that the effect of these provisions was to take away, or revoke, the license theretofore recognized of grazing cattle within forest reserves (133 U. S., 236), and to vest in the Secretary authority to grant permits for grazing upon such conditions as he should impose under rules and regulations adopted under the authority of those acts. The principal question involved was whether the penal provisions of such regulations were unconstitutional as vesting legislative power in the Secretary, and it was held in this regard that the regulations were simply in aid of the provisions of the acts. That question, of course, does not arise here. The only regulation sustained in the forest reserve cases, which by any possibility could be urged here, was the one with respect to the making of a charge for grazing privileges. Bearing in mind the holding of the court that the effect of these acts was to take away the license of grazing, and to make the same unlawful without the consent of the Secretary; that there was no act granting the right to graze; that such privilege was entirely dependent upon the permission of the Secretary under such conditions as he might impose; and that the forest reserve acts expressly recognized the right of the Secretary to impose fees "to prevent excessive grazing, and thereby protect the young growth and native grasses from destruction, and to make

a slight income with which to meet the expenses of management," the decision sustaining the right to charge is not an authority for the Secretary to impose payment for timber cut upon the right of way and extra widths, where it is conceded that a grant of right of way exists under the Act of 1875, provided only the Railway Company executes such stipulation as the Secretary "may require for the protection of the reserve." The asserted authority on the part of the Secretary to require the Company to pay for the timber cut upon the right of way and extra widths would, by the same reasoning, sustain a charge per acre for the land itself included within the right of way, notwithstanding the free grant thereof in fee simple for railroad purposes under the Act of 1875. (*R. G. W. R. Co.* v. *Stringham,* 239 U. S., 44.)

Undoubtedly, the provisions sought to be imposed by the stipulation (Rec., 171), in respect to clearing of the right of way, disposal of the brush and refuse, the falling of trees and the piling of wood, in Clause 1, the observance of reasonable precautions against fire and the furnishing of assistance to put out fires adjacent to the right of way, in Clause 5, are reasonably calculated "for the protection of such reserve," but the requirement to pay for all timber cut within the right of way and the additional strips in Clause 2, which timber was required to be cut upon the right of way, to some extent at least, in order to permit the Railway Company to construct its railroad, and by the direction of the Forest Service upon the entire right of way and the additional widths, merely for affording a protection against fire to the remaining timber within the forest, had no tendency "to preserve the forests thereon from destruction," as provided in the Act of June 4, 1897, or "for the protection of such reserve," within the meaning of the regulation of April 25, 1906.

Point V.

THE CHARGE THAT THE APPELLANT WAS GUILTY OF BAD FAITH IS UNWARRANTED.

In Point IV of the Government's brief, it is charged that appellant "evaded" the execution of the demanded stipulation, that by "a sham agreement and a succession of shallow pretensions," it gained the forbearance of officers of the Forest Service and thereby succeeded in securing the construction of its road without interference by the Government. This charge, which is fully confuted by the record, cannot be passed without objection. Mr. Peck had, as fully shown in the opening brief (see pp. 8-9) signed the writing of May 10, 1907, under a mistake of fact. This writing was not, however, accepted as sufficient to bind the Company. The acceptance noted therein was:

> "Approved and advance permission given to construct, *subject to ratification hereof by the Company.*" (Rec., 37.)

It was never ratified. It appears from the record (pp. 369-379) that the execution of this writing was first brought to the notice of the Company in October, 1907. Mr. Peck was at once advised as to the mistake of fact under which he had acted; and he and Mr. Field immediately notified the officers of the Government, that the paper had been executed under such mistake, and that the Company should not be held thereto. (Rec., 368-384.) November 15, 1907, the Forest Supervisor was notified that the Company would not sign the stipulation. (Rec., 225.)

On December 2, 1907, Mr. Peck notified the forester of the Department of Agriculture at Washington, in writing, that he was not authorized to make any stipulation

with respect to this right of way different from that which had been made for the right of way by the Washington corporation through the Yakima National Forest. (Rec., 225.) It thus appears that the Railway Company immediately upon receiving notice of the existence of the Peck writing, notified the Government that it would not execute the demanded stipulation, and, inferentially, that it would not ratify Mr. Peck's act. There was no concealment of any fact, nor any misunderstanding upon the part of the officers of the Government. This is clearly shown by the memorandum of Mr. Wells, Law Officer of the Forest Service, made December 2, 1907. (Rec., 226, 237.) That memorandum contained the opinion of Mr. Wells upon the legal questions involved, and certainly recognized that they were disputed and doubtful. It also stated that the Company desired a compromise similar to that in the Wenatchee forest, in Washington. Sufficient appears in the record to show that in the case of that forest, where the conditions were similar, the Department did not require payment for the timber. (Rec., 207, 383; testimony of Wells, Rec., 438-440.) After declining to execute the stipulation, like that for the Helena forest, the appellant, through Mr. Field and Mr. Peck, negotiated for a compromise for the right of way, without payment of the timber, along the lines of that consummated in the case of the Wenatchee forest, in Washington. Counsel speak of these negotiations as sham and shallow. They were not so considered by Mr. Wells in his memorandum of December 2, 1907, which stated that the Service would either compromise upon terms to be agreed to hereafter, or submit the case to the courts. That negotiations were carried on in good faith is recognized in the letter of Mr. Wells to Mr. Peck as late as April 27, 1908 (Rec., 237), and he then indicated that he would prepare a draft of a bill

for the purposes of a suit. It is to be noted here that the draft was prepared and submitted to Mr. Field, in July, 1908. (Rec., 239-242.) In the meantime, the Department *revised the stipulation* that it was demanding, and the new stipulation was submitted under date of July 10, 1908. (Rec., 241.) During this time, the work of construction of the railway was proceeding with the full knowledge and acquiescence of the Government, although it was fully advised as to the contention of the Railway Company that it could not legally be required to sign the demanded stipulation, and that it would not do so. The bill of complaint was not filed until July 23, 1909, twenty months after the Department had been notified that the Company refused to sign the stipulation, and only after the practical completion of the road. These undisputed facts establish that the charge of bad faith upon the part of the Company is utterly without foundation.

The other propositions discussed by counsel for appellee are fully met in our opening brief.

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Appellant's Counsel.